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NTSB Order No. EA-3719

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 26th day of October, 1992

THOMAS C. RICHARDS, Administrator, Federal Aviation Administration, Complainant, v. JOHN W. WANG, Respondent.	Docket SE-11833

OPINION AND ORDER

The respondent, pro se, has appealed from the oral initial decision of Administrative Law Judge Joyce Capps, rendered at the conclusion of an evidentiary hearing on February 28, 1992.[1] By that decision, the law judge affirmed an order of the Administrator suspending respondent's private pilot certificate

[1]An excerpt from the hearing transcript containing the initial decision is attached.

on allegations that he violated sections 91.123(b)[2], 91.129(h), and 91.13(a) of the Federal Aviation Regulations (FAR), 14 C.F.R. Part 91[3] by taking off from an airport with an operating control tower, without first obtaining a departure clearance from air traffic control (ATC).

Respondent raises numerous procedural and substantive issues on appeal.[4] Because we find no merit in any of them, we will deny the appeal.

The evidence contained in the record, including a transcript of communications between the subject aircraft and the air traffic control tower, establishes that on October 14, 1990,

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[2]The Administrator has advised the Board in his reply brief that he withdraws the allegation of a violation of FAR § 91.123(b), and he asks that a suspension of 60 rather than 90 days be affirmed.

[3]FAR §§ 91.129(h) and 91.13(a)[codified at 91.87(h) and 91.9 prior to August 18, 1990], provide in pertinent part as follows:

"§ 91.129 Operation at airports with operating control towers....

(h) Clearances required. No person may, at an airport with an operating control tower, operate an aircraft on a runway or taxiway, or take off or land an aircraft, unless an appropriate clearance is received from ATC. A clearance to "taxi to" the takeoff runway assigned to the aircraft is not a clearance to cross that assigned takeoff runway or to taxi on that runway at any point, but is a clearance to cross other runways that intersect the taxi route to that assigned takeoff runway. A clearance to "taxi to" any point other than an assigned takeoff runway is a clearance to cross all runways that intersect the taxi route to that point.

§ 91.13 Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

[4]The Administrator has filed a brief in reply.

civil aircraft N38494 was about to embark on an IFR [Instrument Flight Rules] flight from Boire Field, Nashua, New Hampshire, an airport with an operating control tower. Prior to departure, the aircraft requested an IFR clearance from the controller. The ground controller relayed the request to the Manchester TRACON [Terminal Radar Approach Control facility], which cleared the aircraft to perform ILS [instrument landing system] approaches into Nashua.[5] The controller relayed the clearance to the aircraft, and the clearance was then read back to the tower. The controller acknowledged the readback, and then instructed the aircraft to "advise when ready to taxi." Three seconds later, the aircraft asked to depart from runway thirty two. The controller replied that "runway three two is approved." Two minutes later, the aircraft departed. The controller immediately advised the aircraft that it had not called "ready for departure." See Administrator's Exhibit A-3, Transcript of Communications.[6]

Respondent contends on appeal that the Administrator failed to prove by a preponderance of the evidence that he was the

[5]According to the controller, only the TRACON could issue the IFR clearance because instrument meteorological conditions (IMC) existed at the time of departure.

[6]Respondent notes that the transcript of communications fails to support the Administrator's allegation that the aircraft had been instructed by the tower to contact it when ready to depart. The Administrator has apparently conceded this issue, as signified by the withdrawal of the FAR §91.123(b) allegation and suggestion that the sanction be reduced to 60 days. Accordingly, we will limit our discussion to those facts relevant to the remaining issues raised on appeal.

pilot-in-command of civil aircraft N38494 at the time of the takeoff, which he does not dispute lacked the necessary departure clearance. For the reasons that follow, we find that there was more than sufficient evidence produced which establishes respondent's identity as the pilot-in-command of the subject aircraft.

First, we note, in respondent's notice of appeal of the Administrator's suspension order, which was accepted as his answer to the complaint, he does not deny that he was the pilot-in-command. He states, in pertinent part:

> On October 14, 1990, I John W. Wang, Respondent, initiated an instrument flight out of Nashua Airport, Nashua, New Hampshire in a Piper Warrior aircraft.
>
> Preparatory to departure, we contacted Nashua Tower, and obtained a clearance. In due course, we proceeded on our takeoff roll.
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> As we were lifting off, we were very surprized [sic] when the tower informed us that we had not been cleared for take-off.
>
> I immediately offered to circle to land, as we could quite safely accomplish this, given the ceiling and the visibility at that time.
>
> The tower informed us that that was not necessary, and proceeded to direct us to contact Manchester Approach (124.9) instead, and continue with our flight. (Emphasis added).

Under the Board's Rules of Practice, failure to deny the truth of any allegation in the complaint may be deemed an admission of the truth of the allegation not answered. 49 CFR § 821.31(c). Therefore, respondent's answer to the complaint constitutes an admission that he was the pilot-in-command of the aircraft.

Secondly, respondent's actions on October 14, 1990, have already been the subject of another proceeding before the Board, and in that case, respondent did not deny that he was the pilot-in-command of the subject aircraft. In Administrator v. Wang, NTSB Order No. EA-3264 (March 5, 1991), the Board considered respondent's appeal of the Administrator's emergency order suspending his airman certificate for his failure to submit to an instrument rating flight test re-examination as a result of the same incident, i.e., the takeoff of N38494 without a departure clearance on October 14, 1990. In that case, we recognized that the issue before us was whether respondent's operation of the aircraft raised an issue as to his IFR proficiency, so as to warrant re-examination. Order EA-3264 at 2. Not only did respondent not dispute his identity as pilot-in-command, but in that case he testified under oath that he believed his passenger, also a pilot, misunderstood the tower's approval of a request to use runway 32 for takeoff as a clearance to do so when ready, and then advised respondent that they had been cleared for takeoff. Id. at n.4. The Administrator asserts in his appeal brief that respondent's admissions at the first proceeding should be treated as statements against interest. We agree. We also find that since respondent could have litigated the issue of pilot identity in the first proceeding in his efforts to avoid re-examination but did not, and because the parties to both actions are identical, respondent is precluded as a matter of law from now claiming that he was not the pilot-in-command.

In any event, we believe that there is ample evidence in the record before us to establish respondent's identity as the pilot-in-command of N38494. The FAA investigating inspector testified that respondent told her that he was the pilot-in-command of the aircraft. (TR-83). Respondent explained to her that he misunderstood his clearance, and she subsequently initiated the certificate action against him. Id. This testimony was sufficient to establish at least a prima facie case that respondent was the pilot-in-command of the aircraft. The burden of showing that the passenger on board, also a pilot, was the actual pilot-in-command, then shifted to respondent to come forward with convincing evidence which rebutted the inference raised by his previous admissions. Administrator v. Arroyo, 5 NTSB 1966 (1987); Administrator v. Dye, 2 NTSB 1588 (1976). Respondent failed to meet that burden.

Respondent produced the testimony of the treasurer of the West Wind Aero Club, of which both respondent and his passenger were members. According to him, respondent's passenger, Patrick Mwangi, is a native of Kenya. He came to the United States to obtain a commercial pilot certificate. Members of the flying club apparently agreed to help him build up his hours. The witness claims that Mwangi told him he was the pilot-in-command following the incident, and the witness produced billing and aircraft logs which he claims proved that Mwangi was the pilot-in-command. Finally, the witness testified that Mwangi has a heavy accent and difficulty understanding English at times.

This testimony, when considered in light of other evidence in the record, is unconvincing and insufficient to rebut respondent's admissions. The air traffic controller testified that she recognized respondent's voice on the radio. (TR-59). We have listened to the tape of the communications, and it is clearly not that of a native of Kenya who has difficulty with the English language. Moreover, respondent conceded on the record that it was his voice. (TR-97). Furthermore, the investigating inspector testified that during the course of her investigation, she received an unsolicited statement from Mwangi concerning the incident and which contained his telephone number. The inspector called the number and spoke with a person who identified himself as Mwangi. The inspector testified that the person she spoke with was familiar with the incident, and admitted to her that respondent had pressured him into saying that he was responsible for the misunderstanding. Finally, the inspector testified that she determined that respondent is instrument rated, but Mwangi is not. Since Mwangi did not possess the requisite qualifications to operate the aircraft under instrument flight rules in IMC conditions,[7] respondent was necessarily the pilot-in-command. See Administrator v. Payne, NTSB Order No. EA-3156 (1990)(co-pilot

[7]Respondent also asserts that the Administrator failed to establish a Section 91.13(a) violation because no actual endangerment was caused by the takeoff without a clearance. Board precedent is clear that evidence of potential endangerment is sufficient to support a finding of a violation of section 91.13(a)(previously 91.9). Administrator v. Haines, 1 NTSB 769 (1970), aff'd Haines v. DOT, 449 F.2d 1073 (D.C. Cir. 1971). The takeoff of an IFR aircraft in IMC conditions without a departure clearance creates at least potential endangerment.

did not meet the recency requirements to serve as pilot-in-command); Administrator v. Arroyo, 5 NTSB 1966 (1987)(finding that testimony that second pilot was not qualified considered relevant in determining whether respondent was pilot-in-command); Administrator v. Kuhn, 2 NTSB 1350, 1351 (1975)(holding that respondent, as the only pilot on board who was current, must be held to have acted as pilot-in-command).

We turn next to the procedural issues raised on appeal. Respondent asserts that he was prejudiced in his ability to properly prepare for the hearing because of various problems which occurred prior to trial. We have reviewed the entire Board's file, and have concluded that while there may be specific matters which could have been handled more effectively by the Board's staff, none of them provide a basis for concluding that respondent was hindered in any significant or cognizable way in his defense of the charges.[8] For example, on April 18, 1991, respondent forwarded a copy of his appeal to the Administrator with a cover letter in which he requested that the Administrator produce a witness list and copies of all documents and other evidence intended to be used at the hearing. On June 19, 1991, respondent filed a "Petition to Enforce Compliance With Discovery" with the Board, in which he indicated that the Administrator had failed to respond to his request for discovery.

[8]We also do not believe that the staff's handling of matters exhibited any prejudice towards respondent, although it is evident that his lack of courtesy towards them may have elicited a response in kind.

It appears that respondent's motion was never acted on. We disagree with the Administrator's argument that respondent's "Petition to Enforce Compliance" did not require a response because it was not captioned "Motion to Compel," as it places form over substance. Nonetheless, any error in failing to act on the motion was harmless, as the record is clear that respondent was given all the requested evidence prior to the hearing.[9]

Subsequently, a hearing was scheduled in this matter for October 18, 1991. Respondent, in a letter postmarked September 26, 1991, requested the issuance of a subpoena for the appearance of Patrick Mwangi at a deposition and for the hearing.[10] According to notes written in the file by the Board's staff, the requested subpoenas were issued on October 16th. On October 15, respondent requested a continuance because he had learned that Mr. Mwangi was in Africa. The request for continuance was

[9]Respondent's claim that he was prevented from proving Mwangi was the pilot-in-command because the Administrator failed to produce the entire tape of his communications with the tower, rather than just the portions relevant to the allegations, is equally without merit. As respondent recognized himself at the hearing, evidence of who handled the radio communications at any point in the flight, while persuasive when considered with other evidence, is alone insufficient to establish the identity of the pilot-in-command.

[10]Respondent contends it was error for the Administrator to not produce Mwangi for deposition or as a witness at the hearing. We disagree. It was respondent's responsibility to produce any witnesses he believed could provide testimony in support of his position; that he requested subpoenas for Mwangi prior to hearing is evidence that he is aware of that rule. Nor is the consideration of Mwangi's version of the facts, as related by the testimony of the inspector who interviewed him, erroneous, since hearsay is admissible in Board proceedings. Administrator v. Budar, 3 NTSB 1913, 1914 (1979).

denied. Respondent renewed the request on October 23, and it was again denied. It was suggested by Administrative Law Judge Coffman, who ruled on the request, that respondent locate Mwangi's telephone number and arrange for an overseas telephone deposition. On October 24, 1991, Judge Coffman apparently decided to grant the request for a continuance, after discussing respondent's witness availability problem with FAA counsel, and because FAA counsel indicated she was also unavailable. Respondent was advised telephonically and it was suggested that he retain an attorney and locate his witness within the next 90 days. Several letters between respondent and the Office of Administrative Law Judges ensued. While respondent asserts in vague terms that he was prejudiced by the handling of his request for continuance, he fails to identify, nor have we discovered in our review, any particular harm which was caused to him because the law judge granted the request for a continuance which he initially made.

The hearing was re-scheduled for February 28, 1992. Respondent asserts that he was denied the opportunity to fully prepare for this hearing because he did not receive notice of the new hearing date until he was called by the Office of Administrative Law Judges, which he claims occurred two weeks before the hearing was scheduled. We have reviewed the Board's file, and it does not fully support respondent's contentions. It appears that the notice of hearing was served, by certified mail, on January 8, 1992 to respondent at the following address:

"Internal Medicine & Cardiology, Valicenti Building, Amherst, NH 03031." The street address, "Route 101-A" was apparently omitted in error. The notice was returned to the Board, marked by the Post Office "insufficient address." The returned envelope is annotated with a note that on January 22, 1992, respondent was called and given the hearing information, and that the notice was re-mailed to him by certified mail at the proper address. That envelope is also in the Board's file. It was returned by the Post Office, marked "unclaimed." The envelope is annotated with a note that the notice was remailed by regular mail on February 18, 1992. Thus, respondent received more than 30 days verbal notice and he would have received more than 30 days written notice, had he claimed the certified mail.

Finally, respondent asserts that the law judge who presided over the hearing exhibited bias towards him, and he claims that this bias is evident in her findings concerning the Section 91.123(b) and 91.13(a) violations. As we have already noted, the Section 91.123(b) allegation has been withdrawn, and in our view, the Section 91.13(a) finding is fully supported by the evidence. While the law judge's manner towards respondent was at times nonjudicious,[11] we see no evidence in this record that her evidentiary rulings, or for that matter, her ultimate decision,

[11]For example, respondent asked a witness if it was "possible" the controller could have made a mistake. The law judge properly explained to respondent that such a question was impermissible because anything is "possible," but respondent objected vehemently to the law judge's interruption of his cross-examination. The law judge then called his questions "meaningless" (TR-46) and "stupid." (TR-47).

were adversely affected. There is no basis for dismissal. Administrator v. Blaisdell, NTSB Order No. EA-2673 (1988), aff'd Blaisdell v. National Transp. Safety Board, 869 F.2d 1496 (9th Cir. 1989).

The Administrator has suggested that a suspension of respondent's private pilot certificate for a period of 60 days is appropriate in light of the withdrawal of one allegation. However, our review of the cases cited by the Administrator in support of his argument suggests that a 60 day sanction is appropriate where an actual hazard with other traffic has been established. Board precedent involving takeoffs without clearances under circumstances similar to those here generally entail a 30-day suspension. See e.g., Administrator v. Berg, NTSB Order No. EA-3564 (1992); Administrator v. LaFont, NTSB Order No. EA-3394 (1991).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's order and the initial decision, except with regard to the finding of a violation of FAR Section 91.123(b) and except as to sanction, are affirmed; and

3. The 30-day suspension of respondent's private pilot certificate shall begin 30 days from the date of service of this order.[12]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[12]For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).